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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 120.

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI,
Petitioners,

v.

HAROLD L. ICKES, Secretary of the Interior, *Respondent.*

REPLY BRIEF.

RUSSELL HARDY,
Attorney for Petitioners.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF.

The Brief in Opposition seeks, probably with some success, to draw attention away from the fact that the decision of Respondent against Petitioners was based on suspicion and the application of a harsh and unlawful rule of evidence. The object seems to be to convert the case into one in which his findings of fact are questioned. Petitioners make a distinction between the findings of fact of Respondent and his rule of decision and ministerial action on those findings.

Petitioners rely on the rule that the findings of fact made by the Secretary are conclusive. They seek the benefit of the rule that they are conclusive upon the Secretary as well as upon Petitioners, and may not be reviewed and

reversed by the courts, even at the instance of the Secretary for the purpose of defeating a claimant in whose favor he has found the facts, in the absence of fraud. We strenuously support his findings, condemn his rule of decision, and demand ministerial action consistent with those findings.

In order to escape the fact that the decision against Petitioners was based on suspicion and a rule that that suspicion increased the burden of proof, Respondent seeks to show that his findings in favor of Petitioners were erroneous. For that purpose, Respondent submits a statement consisting principally of a recitation of fragments of the testimony in the administrative hearings. (Brief pp. 4-7)

But the ultimate findings of the Respondent based on all of the evidence in those hearings upon the several charges made, were contrary to the fragments recited, and are shown as follows:

1) *Discovery work.* The Commissioner, in his decision of July 10, 1935, affirmed the finding of the Register that the necessary amount of discovery work had been done. (R. 60, 63.) That charge was then abandoned and in none of the subsequent decisions was it noticed.

2) *Mineral character of deposit.* That sand and gravel is a mineral was decided by the Register, and in none of the subsequent decisions was that finding controverted or reversed. (R. 60.)

3) *Quantity and quality.* The Commissioner, in his decision of July 10, 1935, affirmed the favorable finding of the Register with regard to quantity, and that finding was not subsequently controverted or reversed. (R. 60, 64, 71.) As to quality, the ultimate finding in favor of petitioners was stated in the final decision of August 11, 1939, as follows:

> The decided weight of the evidence is to the effect that the lime coating such as exists on the material in question has not been considered an objection to its

use for concrete construction generally, and is not such a defect as would chill its sale for such purposes. (R. 110.)

4) *Value.* The final decision of the Commissioner, which was overruled on the suspicion rule, held as follows with regard to value:

> As to the present or prospective value of the Sand Hill deposits, the vast area to be irrigated, the highways to be constructed, and the many concrete structures that must necessarily be built, the evidence, including the Columbia Basin reports, CONCLUSIVELY SHOWS that there was at the critical dates mentioned a prospective or potential market value for the sand and gravel deposits. (R. 107.)

Prospective value, thus decided for Petitioner, was then, as admitted in the Brief for the Respondent, the only issue in the case. (Brief, p. 5.) But this finding was reversed by the Under-Secretary for the reasons shown in the following words:

> Considering the facts and circumstances relative to the known conditions at the time of the withdrawal, they are not such as to *impel the conclusion* that the deposits in question were either presently or prospectively valuable at that time.

The decision goes on to state that they did not "impel the conclusion" because of the suspicion and the failure to sustain the increased burden of proof. The Under-Secretary immediately added:

> The claimants here shortly before the withdrawal located these deposits on the terrace of the river situated about a mile and a half from the proposed dam. While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not free from the suspicion by reason of the selection of the site for location that the possibility of appropria-

> tion thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. (R. 116.)

In refusing a rehearing, the statement was made by Respondent that in such case the evidence necessary to sustain a claim "must be more clear and convincing". (R. 121.)

Respondent has boldly confessed that Petitioners' failure to sustain this burden of proof, was his reason for disallowing the claim. As stated in his brief in the Court of Appeals, the claim "was held invalid ONLY because appellees did not sustain their burden of proof."

A decision made in the exercise of a judicial function, which is based upon or materially affected not only by suspicion but also by a failure to dispel that suspicion by "more clear and convincing" evidence than is otherwise required, comes well within the "fraud or imposition" which, as recognized in the Brief in Opposition, will vitiate any decision of Respondent in the administration of the public lands.

Respectfully submitted,

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